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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 757

MARQUETTE CASUALTY COMPANY,
Petitioner, Third Party Defendant-
Appellee Below

versus

PHOENIX ASSURANCE CO. OF NEW YORK

and

JOSEPH JURISICH MARINE SERVICE, INC.
(as the insured of Phoenix Indemnity Co.)
Respondents, Third Party Plaintiff-
Appellant Below

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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JOSEPH JURISICH MARINE SERVICE, INC.
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Appellant Below

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

TO THE HONORABLES, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Marquette Casualty Company, third party defendant in the captioned Third Party Action for reformation of a policy of automobile liability insurance issued and delivered in the state of Louisiana, which was severed from the original suit of *Givens vs. Folse Drayage Co., et al.*, and reserved for a separate trial, respectfully prays that this Court issue writs of certiorari to review the judgment entered in this case against it by the United States Court of Appeals for the Fifth Circuit, on the following grounds, to wit:

OPINIONS OF THE COURTS BELOW

The District Court wrote an opinion in the form of findings of fact and conclusions of law which is not reported, but which is reprinted as Appendix "C" to this application. The Opinion of the Court of Appeals for the Fifth Circuit is reported in 320 F 2d 486, and is reprinted, along with the Judgment, and the Order of the Court of Appeals denying a rehearing, as Appendix "D" to this application. The judgment of the District Court in the original case of *Givens v. Folse Drayage Co., Inc., et al.*, from which this third party action was severed, and which reserves the third party complaint only of Joseph Jurisich Marine Service, Inc.,—not that of Phoenix Indemnity Co. (now Phoenix Assurance Co. of New York)—for a separate trial is not reported, but is reprinted herein as Appendix "A," while the Opinion of the Court of Appeals, Fifth Circuit, affirming the judgment of the District Court in *Givens v. Folse Drayage Co., Inc., et al* is reported in 263 F 2d 858 *sub nom., Phoenix Indemnity Co., et al v. Marcus L. Givens.*

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, was returned on July 24, 1963, and an order denying a petition for rehearing was entered on October 16, 1963. The judisdiction of this Court is invoked pursuant to *28 U.SC.A.* 1254, 1651, 2101 (c).

QUESTIONS PRESENTED

1. Can one plaintiff who has joined with another in bringing a third party complaint in a Federal court whose third party complaint is dismissed on motion of the third party defendant against which dismissal he has failed to appeal, never-the less four years later appeal a judgment on the merits adverse to his co-plaintiff who himself does not appeal—and such appeal be allowed—without violating defendant's property right in the judgment of dismissal and depriving him of his property without "due process of law," to say nothing of violating Rule 73, F.R.C.P. restricting appeals to "parties" and engaging in an impermissible collateral attack on a judgment which has become *res adjudicata* of the rights of the parties in sunch proceedings.

2. Is not such a party whose third party complaint has been dismissed, and who fails to appeal therefrom, barred and precluded from further participation in such proceedings among other parties thereto?

3. Is the result of the foregoing affected if the dismissed party is subrogated to the rights of his co-plaintiff who fails to appeal, where the dismissed party has himself failed to intervene and make himself a party as subrogee of his co-plaintiff pursuant to Rule 24 (a) (2) F.R.C.P.?

4. Is it not depriving the third party defendant in such a proceedings of "due process of law" as guaranteed by the Fifth Amendment of the Constitution of the United States, including notice and a hearing, to subject him to claims by such dismissed third party co-plaintiff asserted for the first time in the Court of Appeal under the guise of "subrogation" in a proceeding from which such co-plaintiff has been dismissed as a party?

5. Where a Court of Appeal finds crucial facts diametrically opposed to the findings of fact entered by the District Court, and the Findings of Fact of the District Court are not "clearly erroneous" but to the contrary are fully supported by the Record—the Court of Appeal facts being unsupported by the Record—has not such Court of Appeal violated Rule 52, F.R.C.P. and committed reversable error?

6. Where a state statutory regulation of insurance requires agreements modifying or extending the coverage of insurance policies to be both in writing and made a part of the policy on pain of invalidity, is not a judgment of a Federal court enforcing an oral agreement to extend the coverage of a policy to include a new named assured violative not only of such State regulations, but of the Federal McCarren-Ferguson Insurance Regulation Act, the Federal "Rule of Decisions" act, and as such subject to reversal?

STATUTES INVOLVED

The statute involved in this case is the Louisiana Insurance Code, La. Revised Statues, Title 22, and particularly sections 628 thereof.

STATEMENT OF THE CASE

This third party action[1] is a suit for the reformation of Marquette Casualty Company automobile liability insurance policy No. CA 1011 in which one of the named insured is "Joseph Jurisich, d/b/a Joseph Jurisich Marine Service," instituted by Joseph Jurisich Marine Service, Inc. (hereinafter referred to as Marine Service, Inc.) and Phoenix Indemnity Company, its general liability insurer, —both of whom are strangers to the policy[2]—who were defendants in an original action based on diversity of citizenship brought by Marcus Givens[3] for personal injuries received by him in an accident on a highway when his automobile was sideswiped by a dragline being moved along the highway on a trailer owned by Folse Drayage Co., Inc., under the supervision of Marine Service, Inc.

Reformation is claimed on the ground that while Marquette Policy No. CA 1011 concededly was issued to "Joseph d/b/a Joseph Jurisich Marine Service," that subsequently during the term of the policy Jurisich converted his business from a proprietorship to a corporation (Marine Service, Inc.), had notified Martin-LeBreton Insurance Agency who was both the Jurisich agent for placing insurance and a Marquette agent for writing insurance—as well as Phoenix's and a number of other underwriters' agent—of the change and instructed such agent to endorse

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[1]See Substitute Third Party Complaint, Supplemental Record p. 63.

[2]Joseph Jurisich, the named assured in Marquette Policy No. CA-1011, and the only person with whom Marquette ever had any contractural relations, was never a party to this third party complaint for reformation, nor did he ever claim reformation of his policy. This alone would appear to be fatal to a suit for reformation of an instrument, "which may be had by the parties thereto . . . but not by persons not parties or privies to the transaction." *Corpus Juris Secundum*, Vol. 76, p. 400.

[3]See Complaint of Marcus L. Givens, Supplemental Record, p. 2

all policies in effect for him (of which Marquette's was but one among many) to include Marine Service, Inc., as a named insured: that Martin-LeBreton acting as agent for Jurisich's various companies agreed to make such endorsements and had so endorsed all other policies, but had failed so to endorse Marquette's policy CA 1011 through neglect and oversight; that under such circumstances third party complainants were legally and equitably entitled to equitable reformation of Marquette policy CA 1011 so as to make Marine Service, Inc., a named insured, and to require Marquette to furnish a defense and pay its proportionate part of any judgment that may be rendered against Marine Service, Inc., in favor of original plaintiff, Givens.[4]

Marquette moved to dismiss the third party complaints[5] urging specifically with regard to Phoenix that Phoenix had "no interest, right, or cause of action" with respect to the reformation of a contract of insurance between Marquette and Jurisich, and that there was no privity of contract of Marquette with Phoenix[6]. On February 11, 1957, the District Court entered a judgment denying the motion to dismiss as to Marine Service, Inc., but in Marquette's favor as to Phoenix, dismissing Phoenix from the third party proceedings in the following language:[7]

> "IT IS ORDERED . . . that the motion of Marquette Casualty Company to dismiss substituted third party complaint of Phoenix Indemnity Company be and the same is hereby GRANTED."

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[4]*Op. Cit. supra* note 1.
[5]See Motion to Dismiss Substitute Third Party Complaint, Supp. R. pp. 75, 73.
[6]*Id.* Supp. R. p. 76.
[7]Supp. R. p. 83.

Phoenix Indemnity Company never appealed from the foregoing judgment of February 11, 1957, dismissing it from this third party proceedings. Indeed this Appeal was filed December 5, 1961.[8] over four years later—and then from a different judgment entered October 24, 1961.

The original suit of Givens was called for jury trial on November 4, 1957; but prior to the commencement thereof, on joint motion of Phoenix, Marine Service, Inc., and Marquette, in order to eliminate the complications of an equitable suit for reformation of an insurance policy from the trial of the Givens damage suit, the Court entered the following order:[9]

> "IT IS ORDERED that the joint motion for a severence of the third party complaint of Joseph Jurisich Marine Service, Inc. against Marquette, and the cross claim of Marquette against Phoenix Indemnity Company, be, and the same is, granted."

The Court will notice that only the third party complaint of Joseph Jurisich Marine Service, Inc., against Marquette was severed by the above Order—the Phoenix third party complaint having already been dismissed, was not and could not be severed. The cross-claim of Marquette against Phoenix is not involved here.

The trial of the Givens action in the District Court resulted in a jury verdict in favor of Givens for $80,000, upon which the Court entered judgment on May 27, 1958, in the following language:[10]

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[8]R. p. 216.
[9]Suppl. R. p. 106.
[10]See Appendix "A".

"This action having been tried and a verdict for the plaintiff against defendants Folse Drayage Company, Inc., and its insurer, and Joseph Jurisich Marine Service, Inc., and its insurers, having been duly rendered on the 8th day of November, 1957, however, the Court having ordered a separate trial on the third party complaint of Joseph Jurisich Marine Service, Inc. seeking reformation of an insurance contract against Marquette Casualty Company and the cross claim of Marquette Casualty Company against Phoenix Indemnity Company, which said matters are pending and to be determined in a separate trial; and there appearing no just reason for the delay of an entry of judgment in this matter, reserving the foregoing issues for a separate trial;

IT IS ADJUDGED that plaintiff, Marcus Lee Givens, recover of defendants Folse Drayage Company, Inc., Highway Insurance Underwriters (subject to their policy limits of $10,000.00) Joseph Jurisich Marine Service, Inc. and Phoenix Indemnity Company, (subject to their policy limits of $100,000.00) in solido, the sum of Eighty Thousand and No. 100 ($80,000.00) Dollars, with legal interest from date of judicial demand until payment of the judgment and all costs:

IT IS FURTHER ADJUDGED that the third party complaint of Joseph Jurisich Marine Service, Inc., against Marquette Casualty Company and the cross claim of Marquette Casualty Company against Phoenix Indemnity Company, be reserved for a separate trial as to such matters and that the fact Marquette Casualty Company is not made a judgment debtor will not prejudice in any way the rights of 3rd party com-

plainant Phoenix Indemnity Company against the said Marquette Casualty Company.

New Orleans, Louisiana, this 27th day of May, 1958.

s/ Herbert W. Christenberry
JUDGE

It will again be particularly observed that the above judgment of the Court reserves only for a separate trial "the third party complaint of Joseph Jurisich Marine Service, Inc., against Marquette Casualty Company," the third party complaint of Phoenix having already been dismissed February 11, 1957. No separate trial of Phoenix's third party complaint was or could be reserved — and the judgment simply goes on to say "that the fact that Marquette Casualty Company is not made a judgment debtor will not prejudice in any way the rights of third party complainant Phoenix Indemnity Company against the said Marquette Casualty Company."

The foregoing judgment was affirmed by the Fifth Circuit Court of Appeal in the case of *Phoenix Indemnity Company, et al, vs. Marcus L. Givens*, reported in 263 F. 2d, 858, and thereafter the judgment in Givens' favor was paid in full by Folse and its insurer to the extent of $24,868.67, and by Phoenix Indemnity Company to the sum of $55,131.33. Joseph Jurisich Marine Service, Inc. never paid one cent of the judgment, the payment being made direct by Phoenix to Givens without any loan receipt being taken from Marine Service, Inc.[11] Upon receipt of pay-

[11]Stipulation, R. pp. 25-26.

ment, Givens thereupon dismissed its actions against Marquette Casualty Company. Marquette then moved to dismiss this third party complaint of Marine Service, Inc. as moot, there being no further liability on Marine Service, Inc. and it having suffered no loss to be indemnified by Marquette.[12] This motion was denied.[13]

In the meantime, Joseph Jurisich Marine Service, Inc. had field a petition for a Corporate Re-organization pursuant to Chapter 10 of the United States Bankruptcy Act, and Capt. J. Covert Wendland was appointed by the United States District Court, Eastern District of Louisiana, as Trustee, with authority to operate the business of Joseph Jurisich Marine Service, Inc., and Wm. Daly was appointed attorney for said Trustee.[14] On July 6, 1960, Marquette Casualty Company's motion to make proper parties to this third party proceedings[15] was granted.[16] and Capt. J. Covert Wendland, Trustee, for Joseph Jurisich Marine Service, Inc., was substituted as the proper party to the proceedings, along with William Daly as the attorney appointed by the Court to represent such Trustee for Marine Service, Inc. When the case was called for trial Mr. Daly was present in the courtroom representing the Trustee,[17] while Phoenix was represented by its counsel, Messrs. Montgomery, Barnett, Brown & Read and Peter Beer.[18]

At the conclusion of the trial, the District Court filed an Opinion[19] consisting of detailed and comprehensive find-

[12]R. p. 2.
[13]R. pp. 6-7.
[14]R. pp. 8-18.
[15]R. p. 7.
[16]R. p. 19.
[17]R. pp. 23, 25.
[18]R. p. 24.
[19]Appendix C.

ings of Fact and Conclusions of Law,[20] resolving all issues of fact and of law in favor of Marquette as well as all inferences to be drawn from such facts, finding and concluding:[21]

> "The evidence offered dose not entitle Phoenix to reformation of the policy issued by Marquette. In order to establish a cause of action for reformation of a contract, the evidence must be clear, convincing, and satisfactory that the instrument does not conform to the intention of the parties. The 3rd party complaint for reformation is denied."

Judgment was rendered in this third party proceedings by the District Court on October 24, 1961, and filed o. October 27, 1961, in the following language:[22]

> "IT IS ORDERED, ADJUDGED AND DECREED by the court that judgment be entered against Joseph Jurisich Marine Service, Inc., on the third-party complaint, seeking reformation of an insurance contract against Marquette Casualty Company.

Thereafter the following notice of appeal was timely filed:[23]

> "Notice is hereby given that Phoenix Indemnity Company (now known as Phoenix Assurance Co. of New York) and Joseph Jurisich Marine Service, Inc. (as the insured of Phoenix Indemnity Company) hereby appeals to the United States Court of Appeals for the Fifth Circuit

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[20]Appendix C.
[21]Conclusion of Law IX *Infra*, Appendix C, p.....
[22]See Judgment, Appendix B.
[23]*Op. Cit. supra* note 7.

from the judgment entered in this action on October 24, 1961.

S Peter H. Beer

Peter H. Beer of
Montgomery, Barnette, Brown & Reed
806 National Bank of Commerce Building
New Orleans, Louisiana"

The court will observe that while the judgment of the District Court was entered against Marine Service, Inc. on its third party complainant seeking reformation of the insurance contract with Marquette, it is nevertheless Phoenix through its attorneys who appeals the judgment rendered against Marine Service, Inc., including in the notice of appeal Marine Service, Inc., "as the insured of Phoenix Indemnity Company," such appeal being taken solely by the attorneys for Phoenix without the concurrence or participation of the trustee in bankruptcy for Marine Service, Inc., or the permission of the Bankruptcy Court for any appeal to be taken from such adverse judgment against it. In other words, although Phoenix was dismissed from this third party proceedings more than four years earlier by a judgment of the court rendered February 11, 1957, yet it is Phoenix, and through Phoenix's attorneys alone, that the judgment against Marine Service, Inc. represented by its duly appointed trustee in bankruptcy who participated in the trial of this proceedings, and who was formally substituted as the proper party for Marine Service, Inc., and without any permission or "by your leave" from the bankruptcy court, who took this appeal, and not the trustee in

bankruptcy through his duly authorized court appointed attorney, who is the only party authorized to appear and to act on behalf of Marine Service, Inc.

Nevertheless, the Circuit Court of Appeals, Fifth Circuit, accepted the appeal taken by Phoenix and its attorneys, reversed the judgment of the District Court, ordered the insurance policy "reformed," and remanded the case to the District Court for further proceedings.

ARGUMENT

A. Appeal Taken By Phoenix Attorneys On Behalf of Phoenix, And Not By Marine Co., Inc., Through Its Trustee in Bankruptcy, Void and Constitutes Collateral Attack on Marquette's Judgment Against Phoenix of February 11, 1957.

1. Dismissal of Phoenix *Res Adjudicata*

As pointed out above, Phoenix was dismissed from this third party proceedings to reform Marquette's insurance policy, by a judgment in favor of Marquette dated February 11, 1957,[23] from which no appeal has ever been taken. Such judgment of dismissal is unquestionably final, is *res adjudicata* between the parties, and Marquette has a vested property right in Phoenix being precluded from asserting further in this proceeding any right or claim for reformation of its contract of insuranc, or for a money judgment after reformation.

2. Final Judgment in Marquette's Favor Valuable Property Right Entitled to Protection Under Fifth Amendment Due Process.

[23] *Op. cit. supra* note 7.

That a judgment of dismissal of a claim is as much a vested property right entitled to protection under the "due process" clause of the Constitution as any other judgment in favor of a litigant see *Casieri's Case*.[24] Marquette's vested property right in not being further proceeded against and harrassed in these proceedings has patently been violated, and thus it has been deprived of its property without due process of law, by permitting Phoenix to appeal from a later judgment on the merits in the very proceedings from which it was earlier dismissed!! The granting of the appeal under such circumstances is nothing less than a collateral attack on, and setting aside of, the judgmetn of February 11, 1957, in Marquette's favor. This is made clear by the Opinion of the Court of Appeals, where it says.[25]

> "There remains only the question of the amount of the recovery, if any, *appellant Phoenix* . . . is entitled to have against Marquette . . ." (Emphasis added.)

It is respectfully submitted that the effect of the above is to deprive Marquette of the benefits of the final judgment in its favor of February 11, 1957, dismissing Phoenix from this proceeding, and after such final dismissal to put Phoenix right back in this proceeding from which it has once been dismissed!!

3. Court of Appeal Lacked Jurisdiction of the Appeal

Furthermore, the Court of Appeals lacked jurisdiction of this appeal and violated Rule 73, F.R.C.P. in permitting

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[24]286 Mass. 50, 190 N.E. 118.
[25]Appendix D, p. 63.

it. Rule 73 permits appeals only to be taken by "a party." In view of the judgment of February 11 dismissing it, Phoenix certainly was not "a party" to this proceedings in October of 1961 when the appeal was taken, and hence not entitled to exercise the right of appeal, as the proper parties were not before the Court.[26]

4. Phoenix' Rights to Participate in Reformation Proceedings Not Reserved.

The courts below seemed to believe that Phoenix's rights to participate in this third party proceedings were somehow "reserved" by the judgment of November 2, 1958. But a glance at that judgment dispels any such idea. It clearly states that the only reservation of a right to proceed in a separate trial in this case on a third party complaint for the reformation of Marquette's policy was in favor of Marine Service, Inc. — not Phoenix. But as to Phoenix the judgment only providse that Phoenix's rights "will not be prejudiced in any way" by Marquette not being made a judgment debtor.

Moreover, the judgment of May 27, 1958, is more than a year later than the February 11, 1957 judgment dismissing Phoenix from the reformation action, and could not relate back to affect or prejudice Marquette's vested rights in the February 11, 1957 judgment. The Court certainly could not prejudice Marquette's vested judgment rights in not prejudicing the rights of Phoenix!! and in-

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[26] *First Iowa Hydro Electric Co-op. v. Iowa-Illinois Gas & Elec. Co.*, 245 F. 2(d) 630; *Cutting v. Bullerdick*, 188 F. 2(d) 837; *Penwell v. Newland*, 180 F. 2(d) 551; *Cook & Sons Equipment, Inc. v. Killen*, 277 F. 2(d) 607.

deed Phoenix has exercised those very rights not prejudiced as the Court provided by commencing a new and different action against Marquette in the United States District Court in New Orleans.

5. Phoenix Not Exercising Subrogation Rights.

The Court of Appeals sought to duck this whole issue on the theory that "Phoenix was subrogated to the rights of . . . Marine Service, Inc., and that there was no disability in its rights to maintain this action."[27]

But simply because Phoenix may be entiled to subrogation does not give it the status of a "party" and entitle it to appeal Marine Co., Inc.'s case where its court appointed attorney fails to appeal. Phoenix had a right to intervene as a party under Rule 24(a)(2) F.R.C.P. but failed and neglected so to protect its subrogation interests and failing to have itself made a "party" cannot exercise the right of appeal vested exclusively in "parties."

But even if Phoenix is exercising only the subrogated rights of Marine Service, Inc., and not its own rights to recoup all or part of the payments made by it, then this case must be dismissed as moot, because it is clear that Marine Service Inc. paid nothing, lost nothing, and is indebted for nothing on account of the automobile accident and Givens' suit.[28] Hence if Phoenix appears, as the Court of Appeals suggests, merely as the subrogee of Marine Service Inc., Phoenix is subrogated to nothing but the

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[27]See Opinion, Appendix D, p. 63.
[28]See Affidavit of Joseph Jurisich, R. p. 4.

empty right and Phyrric victory of reforming a lapsed policy and the case must be dismissed as moot. But if Phoenix appears under the guise of a subrogee of Marine Co., Inc., to assert its own claim for the recoupment of its own funds disbursed, then Phoenix is asserting its own claims that have been dismissed from this proceedings by the final judgment of February 11, 1957 in favor of Marquette, and Marquette is being deprived of its judgment in this proceeding without due process of law.

6. Marquette Seriously Prejudiced and Deprived of Due Process of Law, and an Opportunity to Answer the Demands of Phoenix or to Present Its Defenses, and to a Hearing Thereon by Phoenix Being Allowed to Appeal Herein, and Assert its Claims in the Court of Appeals.

As pointed out above, Phoenix was dismissed out of these proceedings on Marquette's motion. Marquette, therefore, has never been called upon to answer Phoenix's complaint, or to present its defenses to Phoenix's claims. The only answer Marquette has been called upon to file or has filed is its answer of April 10, 1957, to the third party complaint of Marine Service, Inc.[29] All hearings, trials and proceedings in this matter being had solely on the complaint of Marine Service, Inc.

Consequently Marquette has had no opportunity to present or to be heard on any defenses it may have to the claims of Phoenix; yet it suddenly finds itself confronted in the Court of Appeals with a claim against it by Phoenix

[29]Supp. R. p. 92.

for $50,000.00, not on account of any liability it may have to its assured, Marine Service, Inc., who, as pointed out above, has lost nothing and paid nothing on account of the accident, but on account of payments made by Phoenix!

For example, Phoenix claims for the very first time in the Court of Appeals the right to be subrogated to an alleged claim of Marine Serivce, Inc., against Meadows, who it is alleged is an "omnibus assured" of Marquette, and whose negligent execution of his duties as a Marine Service, Inc. employee exposing it to liability makes Meadows liable to Phoenix as subrogee.[30] Marquette has a myriad of defenses to any such claim, but has never had an opportunity for a hearing thereon or to prove such defenses. In the first place Marquette has the defense that Meadows was not personally negligent because he performed his tasks in accordance with the instructions he received from his employer, Marine Service, Inc. A second defense is estoppel. A third, prescription, and so on. Yet these defenses cannot be urged in this proceeding because the claim is asserted by Phoenix who is not a party hereto.

Marquette is entitled to notice and a hearing on such claims of Phoenix — not in this proceedings from which Phoenix has been dismissed as a party — but in a proceedings in which Phoenix is properly a party, and where a hearing can be had thereon. To require less is to expose Marquette to a deprivation of its vested rights and property without notice and hearing, and without due process

[30] See Memorandum in Opposition to Petition for Rehearing, R. p. 278.

of law, contrary to the Fifth Amendment of the United States Constitution.

B. Court of Appeals Violated Rule 52, F.R.C.P. and Decided Case on Erroneous Facts Not Supported by Record.

Crucial facts found and relied on by the Court of Appeals in its Opinion are wholly unsupported by the evidence, are directly contrary to the facts found by the District Court in its elaborate, detailed, and careful Findings,[31] fully supported by the evidence, and account for the reversal of the District Court judgment.

The Court of Appeals sought to disguise the fact that it was actually setting aside the Findings of Fact of the District Court contrary to Rule 52, F.R.C.P., and substituting its own erroneous facts in the place thereof, by stating in its Opinion that "the findings of fact entered by the Court below are in practical accord,"[32] and that "the foregoing facts appear from the record without substantial dispute."[33] The falsity of such statements will be fully demonstrated below.

One series of crucial facts in this case affected the ownership of the fateful dragline at the time of the accident, whether it was insured by an insurer other than Marquette, whether there was any intention to insure it both in Marquette and in Maryland Casualty Co., and thus pay double insurance premiums for the same protection. These questions obviously bore heavily on the question of intent to insure, to change insurance, and with whom.

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[31] Appendix C.
[32] Opinion, Appendix D *infra*, p. 55.
[33] *Id.*,

Bearing in mind that the crucial date as to insurance coverage is April 21, 1955 — the date of the accident — the following irreconcilable findings of fact appear:

FINDINGS OF THE DISTRICT COURT	FINDINGS OF 5TH CIRCUIT COURT
XI. . . . "The dragline was owned by the Jurisich Construction Co., and upon dissolution [May 31, 1955] was owned by Joseph Jurisich, Jr., individually, by verbal agreement. The dragline was not carried on the books of Jurisich Marine Service, Inc., until May 31, 1955 . . ."	P. 8. "The dragline . . . was owned by Marine Service Inc. at the time of the collision [April 21, 1955] and had been so owned for several months. P. 6. All of the properties and the business operations theretofore conducted by Jurisich under the several names appearing above [including Jurisich Construction Co.] were then [October 15, 1954] conveyed to . . . Jurisich Marine Service Inc. P. 12 "Moreover, the proof showed without contradiction that the operations described in the Marquette Policy No. CA 1011 were transferred to the new corporation on October 15, 1954."
•	•
XII. "Maryland Casualty Co. was the insurer of the Jurisich Construction Co. until said Jurisich Con-	P. 8. ". . . it was the intent of the parties long before liability to Givens arose that Marquette be liable

struction Co. was liquidated [May 31, 1955].
XIII. There is no evidence of a request for any *additional* insurance on the dragline in question.

under the terms of Policy No. CA 1011 for personal injuries arising from the ownership of the dragline.

With respect to the likewise crucial question of knowledge of Marquette there is eqully irreconcilable conflict in the findings, viz:

FINDINGS OF THE DISTRICT COURT	FINDINGS OF 5TH CIRCUIT COURT
XIII. "There is no evidence in the record that Marquette . . . or Phoenix . . . were informed of the request to change the insured . . ."	P. 6. "Martin . . . testified that he gave notice of the change to each of the insurance companies involved."
XV. "Marquette's renewal policy . . . was in effect on April 22, 1955, but was not counter - signed by Marquette until May 10, 1955." XIII. "There is no evidence in the record that Marquette . . . were informed of the request to change the insured."	P. 7. "Shortly after the collision occurred, Martin issued Marquette's renewal policy effective at 12:01 A.M. March 22, 1955. This renewal was a result of the verbal instructions which had been given Martin by Jurisich on or about October 14, 1954.

As to the correct inferences to be drawn from the facts, and the sufficiency of proof offered, the two Courts

are similarly in irreconcilable conflict, viz:

CONCLUSIONS OF DISTRICT COURT	FINDINGS OF 5TH CIRCUIT COURT
IX. The evidence offered does not entitle Phoenix to reformation of the policy issued by Marquette. In order to establish a cause of action for reformation of a contract, the evidence must be clear, convincing and satisfactory that the instrument does not conform to the intention of the parties. The Third party complaint for reformation is denied.	P. 11. "On the crucial point here (to establish a cause of action for reformation of a contract, the evidence must be clear, convincing and satisfactory that the instrument does not conform to the intention of the parties) the evidence is all one way" (in favor of Phoenix). (Part in parenthesis added.)

Rule 52 of the Federal Rules of Civil Procedure requires that:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."

The cases upholding, applying and enforcing Rule 52 are legion and require no citation. But it is not only facts, but inferences of fact drawn by the trial court that "shall not be set aside unless *clearly erroneous*."[31] The above "Conclusion" is clearly and obviously an inference of the District Court that the facts produced by Phoenix through

[31] 32 *U.S. v. Gypsum Co.*, 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 746, Rehearing denied, 333 U.S. 869, 68 S. Ct. 788, 92 L. Ed. 1147; *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123, etc.*; C.C.A. Ala. 1943, 137 F.2d 176, Aff'd 321 U.S. 590, 64 S. Ct. 698, 88 L. Ed. 949, 152 A.L.R. 1014; *James Service Fire Ins. Co. of N.Y. v. U.S.*, 252 F.2d 687 (C.C.A., 5, 1958); *Bryan v. Garratt Tool Co.*, 245 F.2d 365 (C.C.A. 5, 1957).

the evidence were not clear, convincing and satisfactory to establish that the policy No. CA 1011 did not conform to the intention of the parties, and the embodiment of it by the District Court in its "Conclusions of Law" does not detract one whit from its conclusiveness under Rule 52, unless "clearly erroneous," *Fix Fuel & Material Co. v. Wabash R. Co.*[35]

It is clear that here, Court of Appeal has ignored crucial facts found by the District Court, set them aside and found contrary facts without any support in the Record, and without any finding or even attempt to show that they are "clearly erroneous," flagrantly violating Rule 52 of the Federal Rules of Civil Procedure. Indeed, the Court of Appeals so changed the facts of the case, as established in the Record and as found by the District Court, that the case as reported is hardly recognizable as the same case tried in the District Court. Marquette is entitled, under Rule 52 and plain fairness, to have its case passed on and determined by the Court; and not a fanciful case dreamed up by the Court of Appeals in disregard of crucial facts found by the District Court. The extent to which the Court of Appeals erred, and the seriousness of the false facts and inferences it fell into as a result thereof, are more fully discussed in Marquette's *Petition for a Rehearing*, pages 9-13, bound as part of the Transcript of the Record at page 252 thereof, to which reference is hereby made, where the Court will find a full discussion and reference to the Record supporting the Findings of the District Court, and refuting those of the Court of Appeals. This flagrant error of the Court of Appeals should be corrected.

[35] 243 F2d 110.

C. Court of Appeal Violated U.S. McCarran Act and Louisiana Law.

Rarely has a Federal court more flagrantly flaunted both Federal statutes and state laws than in this case. Congress, in the McCarran-Ferguson Insurance Regulation Act[36] has solemnly declared:

> "The business of insurance . . . shall be subject to the laws of the several states which relate to the regulation . . . of that business."

Section 628 of the Louisiana Insurance Code unquestionably regulates insurance in Louisiana by requiring agreements modifying or extending the coverage of insurance policies to be both in writing and made a part of the policy in the following explicit language:

> "No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless in writing and made a part of the policy."

The alleged "agreement" for extending the coverage of Marquette Policy No. CA 1011 to cover Marine Service, Inc., was entirely oral, was never in writing, and of course was never made a part of the policy. The District Court on the basis of a long line of Louisiana decisions, concluded that the alleged oral agreement was invalid,[37] but the Court of Appeal brushed it and the Louisiana Insurance Code aside, saying only:

> ". . . the trial court's conclusion [was] based, pre-

[36]15 U.S.C.A. 1012.

[37]Conclusion of Law No. VII, District Court Findings, Appendix C.

sumably, on a literal application of the statute's provisions.

The statute does not apply to the addition of an insured any more than to any other changes or modifications.[38]

Article 13 of the Louisiana Civil Code provides: "When a law is clear and free from all ambiguity, the letter of it is not to be disregarded . . ."

It is respectfully suggested that the Court of Appeal's disregard, not only of the Louisiana Insurance Code, but of the Federal McCarran-Ferguson Act, should be corrected and reversed.

D. Court Misunderstood and Misapplied Law of Reformation of Contracts in Violation of State Law and Federal Statutes.

The plain truth of the matter here is that the Court of Appeals here did what the District Court held it was not authorized to do — rewrote, not reformed, the policy. There could never be any question of reformation because the contract of insurance was entered into some six months before Marine Service Inc. was even organized. Hence neither party had any intention of including Marine Service Inc. as a named insured in Policy CA 1011 because it was not even in existence at that time! As mutual mistake is an essential element for reformation, it is hornbook law that no court can reform this policy — it can only rewrite it to include a new entity.

[38]Opinion, Appendix D, *infra* p. 58.

The Court of Appeals attempted to justify this on the basis of waiver or estoppel resulting from the negligence of Martin-Lebreton Insurance Agency,[39] who was not only the agent of Marquette, but of Marine Service Inc. and Phoenix as well.[40] But in so doing it decided in conflict not only with the general law, but with its own earlier decision in *C. E. Carnes & Co. v. Employers Liability Corp.*,[41] where the Court distinguished between the application of the doctrines of waiver and estoppel to prevent a forfeiture under a policy on the one hand, and to justify an extension of coverage on the other hand, holding that such doctrines could never be used to justify an extension of coverage. In the *Carnes* case, where the facts were quite similar to those in the present case, the Court said:[42]

> "To do this (i.e., reform the policy so as to extend coverage) we must banish the parties, permit our imagination to hold sway, and write into the policy terms never contemplated by them. The effect would be to create a new contract . . .
>
> This is a case where the coverage is sought to be extended. The doctrine of waiver cannot be invoked to create a primary liability, and bring within the coverage of the policy risks not included or contemplated by its terms."

Yet that is precisely what the Court of Appeals did here — contrary to its prior decisions and the judgment of the District Court which it reversed, to say nothing of the Louisiana Insurance Code and the Federal McCarran-Ferguson Act! This decision cannot be allowed to stand.

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[39]Opinion, Appendix D, p. 57.
[40]District Court Findings of Fact, Appendix C, Finding IX.
[41]101 F2d 739.
[42]*Id.*, at pp. 741-742.

REASONS FOR GRANTING WRITS

Your petitioner suggests the following reasons why this Honorable Court should grant a writ of certorari to review the decision of the Court of Appeal, Fifth Circuit, in this cause. There are aspects of this case of great public interest involving the integrity of Federal Court judgments; the extent to which the public is protected from careless interpretations and misunderstandings by Appellate Courts of facts as disclosed in the written record by Rule 52 of the Federal Rules of Civil Procedure, as compared to carefully made findings of fact of District Courts who have, as Rule 52 wisely points out "the opportunity . . . to judge of the credibility of the witness." This case also indicates a flagrant disregard by Federal Appellate Courts of state laws and of state regulations of insurance which Congress, in the McCarren Ferguson Insurance Regulation Act has specifically provided is within the regulations of State legislatures. Finally the Appellate Court, in reversing the judgment of the District Court in this case, has totally disregarded the elementary principal of the law of the reformation of contracts even to the extent of deciding directly contrary to its own prior decision in *C. E. Carnas and Co. vs. Employers Liability Corporation*, 101 F. 2d 739, without even realizing it, apparently having forgotten its earlier decision because no reference whatever is made to it in the Court's Opinion.

It is respectfully submitted:

1. In the case at bar the Chief Judge of the District Court for the Eastern District of Louisiana, New Orleans Division, made especially careful and comprehensive find-

ings of fact and conclusions of law in this quite complicated case. The District Court's findings in every instance are fully supported by the record and the testimony, and his conclusions of law are carefully keyed both to the decisions of Louisiana Courts and to the statutory and insurance laws of Louisiana. It is most shocking to find such careful work reversed by an Appellate Court Opinion where the facts found by it are so different that one hardly recognizes the same case. The facts are so slip-shoddily found that even critical dates are misquoted, and while the Opinion in one place states that the Marquette Policy "did not expire until 12:01 A.M., March 22, 1955, less than 24 hours after the Givens' accident had occurred," the very opening line of the Opinion states that the accident occurred April 21, 1955, some 30 days later! The Opinion is replete with such glaring inaccuracies and errors, particularly when compared with the facts as found by the District Court and as disclosed in the record and by the testimony of the witnesses.

This case is, therefore, not only of great importance to the parties, where at least $50,000.00 is at stake, but is of even greater importance publicly. This Honorable Court adopted Federal Rule 52 with the express purpose in view of discouraging and eliminating such slipshod decisions. If Appellate Courts are permitted to run roughshod over Rule 52 and cover up their violations by untrue statements that the facts "appear from the record without substantial dispute, and the findings of fact entered by the Court below are in practical accord," then not only is the purpose of Rule 52 defeated, but the confidence of litigants in having their cases thoroughly reviewed on appeal

will be weakened, and thus confidence in the Federal Judicial System will be seriously shaken. A review to determine and correct this state of affairs is certainly in the public interest.

2. Of equal importance is the cavalier treatment given by the Court to the Judgment entered during the early stages of this case in favor of Marquette Casualty Company dismissing third party plaintiff Phoenix, completely out of this proceedings. Despite such judgment, Phoenix has now been let back in through the back door of the Court of Appeal, without being a party to these proceedings as required by Federal Rule 73 under the guise of a "subrogee." But this obviously does not cure the fact that Phoenix still is not a party to these proceedings, not having even attempted to avail itself of Rule 24(a) and intervene as a party. So subrogee or not, Phoenix still has no standing in any court, Appellate or otherwise, in these proceedings, not being a party thereto.

The result of this has been to deprive Marquette of notice of Phoenix's claims, of an opportunity to defend and be heard with respect thereto, and deprived Marquette of its property right in the judgment in its favor dismissing Phoenix from this proceedings without the due process of law guaranteed by the Fifth Amendment of the Constitution. These are certainly serious results crying for the protection and supervision of this Honorable Court.

3. Finally, the Court of Appeal has been equally cavalier in its treatment of the Louisiana State Regulation of Insurance. While by the Louisiana regulations, any modifications, extensions of coverage or change in an insurance policy must be both in writing and attached to the policy,

the Court of Appeal in this case tore up said regulation, contrary to the holding of the District Court, and has "reformed" an insurance contract by alleged oral agreement to extend its coverage to include a new corporation formed some six months after the policy was wirtten. This the Court of Appeal has done in the name of "equitable reformation." Actually it is nothing but a stark rewriting of the contract in violation of the Louisiana Insurance Code and in violation of the same Court's earlier decision in the *Carnas* case. Again, if the integrity of state regulations of insurance which Congress thought important enough to seek to protect in the McCarren-Ferguson Insurance Regulation Act, is to be upheld, decisions of this kind must somehow be curbed.

CONCLUSION

WHEREFORE, your petitioners respectfully pray that a writ of certiorari may issue directed to the United States Court of Appeals for the Fifth Circuit commanding that court to certify and to send to this court a full and complete transcript of the record of all proceedings of said court in the above-entitled cause, to the end that said cause may be reviewed and determined by this Court as provided by law.

And your petitioners will ever pray.

JAMES J. MORRISON
1007 National Bank of Commerce Building
New Orleans 12, Louisiana
Attorney for Petitioner.

PROOF OF SERVICE

I, James J. Morrison, Attorney for Marquette Casualty Company, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify, pursuant to Rule 33, 3 (b); that on the 13th day of January, 1964, I served copies of the foregoing Petition for a Writ of Certiorari on Phoenix Assurance Company of New York and Joseph Jurisich Marine Service, Inc., respondents by mailing a copy in a duly addressed envelope, first class postage prepaid to Richard B. Montgomery and Peter H. Beer, Attorneys for respondents, 806 National Bank of Commerce Building, New Orleans 12, Louisiana, their counsel of record.

JAMES J. MORRISON

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MARCUS L. GIVENS

vs.

FOLSE DRAYAGE CO., INC., ET AL

vs.

MARQUETTE CASUALTY COMPANY

Third Party Defendant

CIVIL ACTION
No. 5417

JUDGMENT

This action having been tried and a verdict for the plaintiff against defendants Folse Drayage Company, Inc., and its insurer, and Joseph Jurisich Marine Service, Inc., and its insurers, having been duly rendered on the 8th day of November, 1957, however, the Court having ordered a separate trial on the third party complaint of Joseph Jurisich Marine Service, Inc. seeking reformation of an insurance contract against Marquette Casualty Company and the cross claim of Marquette Casualty Company against Phoenix Indemnity Company, which said matters are pending and to be determined in a separate trial; and there appearing no just reason for the delay of an entry of judgment in this matter, reserving the foregoing issues for a separate trial.

IT IS ADJUDGED that plaintiff, Marcus Lee Givens, recover of defendants Folse Drayage Company, Inc., Highway Insurance Underwriters (subject to their policy limits of $10,000.00), Joseph Jurisich Marine Service, Inc. and Pheonix Indemnity Company (subject to their policy limits of $100,000.00) in solido, the sum of Eighty Thousand and No/100 ($80,000.00) Dollars, with legal interest from date of judicial demand until payment of the judgment and all costs:

IT IS FURTHER ADJUDGED that the third party complaint of Joseph Jurisich Marine Service, Inc., against Marquette Casualty Company and the cross claim of Marquette Casualty Company against Phoenix Indemnity Company, be reserved for a separate trial as to such matters and that the fact Marquette Casualty Company is not made a judgment debtor will not prejudice in any way the rights of 3rd party complainant Phoenix Indemnity Company against the said Marquette Casualty Company.

New Orleans, Louisiana, this 27th day of May, 1958.

s/ Herbert W. Christenberry
JUDGE

Filed: June 2, 1958

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MARCUS L. GIVENS

vs.

FOLSE DRAYAGE CO., INC., ET AL

vs.

MARQUETTE CASUALTY COMPANY
Third Party Defendant

CIVIL ACTION
No. 5417

JUDGMENT

(Filed: October 27, 1961)

This matter having been tried to the court without a jury, and the court having taken this matter under submission and having considered the same:

IT IS ORDERED, ADJUDGED AND DECREED by the court that judgment be entered against Joseph Jurisich Marine Service, Inc., on the third-party complaint, seeking reformation of an insurance contract against Marquette Casualty Company.

IT IS FURTHER ORDERED AND DECREED by the court that judgment be entered against Marquette Casualty Company on its cross-claim against the Phoenix-Indemnity Company.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

MARCUS L. GIVENS

vs.

FOLSE DRAYAGE CO., INC., ET AL

vs.

MARQUETTE CASUALTY COMPANY
Third Party Defendant

CIVIL ACTION
No. 5417

OPINION OF THE COURT

CHRISTENBERRY, J:

(Filed: May 17, 1962)

The evidence and arguments of counsel on the Third Party Complaint of Joseph Jurisich Marine Service, Inc., seeking reformation of Marquette Casualty Company's insurance policy CA-1011, and the Crossclaim of Marquette Casualty Company against Phoenix Indemnity Company having been heard by the Court without a jury, and the Court having taken time to consider the matters, hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

This is a sequel to Phoenix Indemnity Company, et al vs. Givens, reported in 263 F.2d 858, where Joseph Jurisich Marine Service, Inc. was held liable for its negligence, along with Folse Drayage Company, in a highway accident in which plaintiff Givens' arm was severed by a dragline owned by Jurisich Construction Company, which was being moved along the highway by Folse Drayage Company under the supervision of an employee of Joseph Jurisich, Marine Service, Inc.

II.

At the time of the accident, Joseph Jurisich Marine Service, Inc. was insured under a policy of general liability insurance by Phoenix Indemnity Company. Joseph Jurisich Marine Service, Inc. also claimed to be an assured under Marquette Casualty Company's automobile liability policy No. CA-1011, which policy included as a named assured, not Joseph Jurisich Marine Service, Inc., but "Joseph Jurisich, Jr., d/b/a . . . Joseph Jurisich Marine Service." Upon Marquette's insistence that Joseph Jurisich Marine Service, Inc. was not insured under its policy CA-1011, Marine Service, Inc. brought this third party complaint in the suit against it by Givens praying for reformation of Marquette's policy No. CA-1011 so as to include it as a named insured. Plaintiff Givens then amended to bring a direct action against Marquette.

III.

On joint motion of all interested parties, prior to the jury trial of the principal action, the issue of the reformation of Marquette's policy No. CA-1011 raised by Marine Service, Inc.'s third party complaint, was severed from the principal s' t of plaintiff, along with various cross-claims of Marquette against Phoenix, and a decision on the third party complaint and on the various cross-claims was reserved for subsequent trial and determination, which has now been had.

IV.

In the meantime, the jury returned a verdict in the principal action against defendants and their insurers and in favor of plaintiff for $80,000.00, on which judgment was entered against Folse Drayage Company and its insurer, Highway Insurance Underwriters, and against Joseph Jurisich Marine Service, Inc., and its insurer, Phoenix Indemnity Company, who admitted coverage, for the full amount of the verdict, the judgment providing:

> "IT IS FURTHER ADJUDGED that the third party complaint of Joseph Jurisich Marine Service, Inc., against Marquette Casualty Company and the cross-claims of Marquette Casualty Company against Phoenix Indemnity Company, be reserved for a separate trial as to such matters and that the fact Marquette Casualty Company is not made a judgment debtor will not prejudice in any way the rights of third party complainant Phoenix Indemnity Company against the said Marquette Casualty Company."

V.

Prior to the hearing on this third party complaint, the judgment in favor of plaintiff was fully paid by Folse Drayage Company and Phoenix Indemnity Company, and an "acknowledgement of satisfaction of judgment" dated June 2, 1959, was filed of record in these proceedings, along with a motion and order dismissing plaintiff Givens' direct action against Marquette Casualty Company on the ground that the judgment in plaintiff's favor had been fully paid and satisfied; but the right of Phoenix Indemnity Company to attempt to reform the Marquette Casualty Company Policy No. CA-1011 were reserved and not prejudiced.

VI.

Marquette Casualty Company issued its Automobile Liability Policy of Insurance No. CA-1011 on April 22, 1954, expiring at noon April 22, 1955, the named assureds therein being "Joseph Jurisich, Jr., d/b/a Joseph Jurisich Transfer and Joseph Jurisich Marine Service, and Joseph Jurisich, Jr., and Joseph Larson, a partnership, d/b/a Joseph Jurisich Motor Freight."

VII.

The accident which is the subject matter of this litigation occurred April 21, 1955, within the period Marquette's policy No. CA-1011 was in effect.

VIII.

In the interim, on October 15, 1954, Joseph Jurisich incorporated the marine service business which he had pre-

viously been carrying on in his own name into a Louisiana corporation under the corporate name of "Joseph Jurisich Marine Service, Inc.", of which he was the only stockholder, except for qualifying shares.

IX.

At all material times, Martin-Lebreton Insurance Agency, Inc. was an insurance broker and placed most of the insurance for all of the various Jurisich enterprises. At all material times, Martin-Lebreton Insurance Agency was an authorized agent of Marquette Casualty Company, Phoenix Indemnity Company, and other insurance companies.

X.

Neither Joseph Jurisich, Jr. nor Marine Service, Inc. ever specified what company their insurance should be placed with, but left it to the discretion of Martin-Lebreton Insurance Agency.

XI.

The dragline involved in the accident which gave rise to the original action was not owned by the Jurisich Marine Service at the time the policy in question (No. CA-1011) was issued. The dragline was owned by the Jurisich Construction Company, and upon the dissolution of that entity it was owned by Joseph Jurisich, Jr., individually, by verbal agreement. The dragline was not carried on the books of Jurisich Marine Service, Inc. until May 31, 1955; but, as a factual matter it was used, controlled, operated

and maintained by the corporation from the corporation's inception on October 15, 1954.

Consequently, the dragline can only be covered by the policy (CA-1011) if there was an endorsement issued which would have included the equipmnet owned and operated by Joseph Jurisich Marine Service, Inc., within the coverage afforded by the said policy.

XII.

Maryland Casualty Company with the insurer of the Jurisich Construction Company until the said Jurisich Construction Company was liquidated. Maryland Casualty Company was dismissed from the original action by the Court on the ground that the ownership of the dragline had been transferred to Joseph Jurisich Marine Service, Inc. prior to the accident. (See Judgment dated October 31, 1957; Document No. 109 in record.).

XIII.

Shortly after the incorportion of Joseph Jurisich Marine Service, Mr. Joseph Jurisich, Jr. instructed Mr. George Martin, a partner in Martin-Lebreton Insurance Agency, to transfer the insurance on Joseph Jurisich, Jr., d/b/a Joseph Jurisich Marine Service, to Joseph Jurisich Marine Service, Inc. The instruction was given by telephone and admitted by Mr. Martin. Through error in the office of Martin-Lebreton Insurance Agency, no such endorsement or change was ever made on the policy CA-1011. There is no evidence in the record that Marquette Casualty Company or Phoenix Indemnity Company were informed

of the request to change the insured Joseph Jurisich, Jr., d/b/a Jurisich Marine Service under the policies to Joseph Jurisich Marine Service, Inc. No additional premiums were charged or collected by Marquette Casualty Company or Martin-Lebreton Insurance Agency in connection with the requested change. There is no evidence of a request for any additional insurance on the dragline in question.

XIV.

The policies issued by Marquette and Phoenix were not flat-rate premium policies, but were policies on which the amount of the premium ultimately due depends on an audit conducted at the end of the policy period as to the equipment and risks covered and the volume of business done. The inclusion of additional equipment and additional risks —such as the dragline in question—obviously affected the ultimate premium to be earned after audit. The proof showed that an increased premium actually became due by Joseph Jurisich Marine Service, Inc., after audit, because of the operation of the particular dragline on the occasion of the accident, and that the premium was paid to and received, not by Marquette Casualty Company, but by Phoenix Indemnity Company. (T. pp. 92-93 *sic.* 131-133).

XV.

Mr. George Martin was unable to testify as to why the policies issued by Marquette and Phoenix were not endorsed in accordance with the request made by Mr. Joseph Jurisich, Jr., subsequent to the incorporation of Joseph Jurisich Marine Service. The said policies were never so

endorsed, and continued in effect as written until expiration. When the Phoenix Indemnity Company's policy expired, prior to the accident, it was renewed, and Joseph Jurisich Marine Service, Inc. was a named assured. Marquette's renewal policy which named Joseph Jurisich Marine Service, Inc. as an insured, was in effect on April 22, 1955, the day after the accident; but was not countersigned by Marquette until May 10, 1955.

XVI.

Subsequent to the incorporation of Jurisich Marine Service on October 15, 1954, there were endorsements made on the Marquette policy No. CA-1011, but as already stated, no endorsement to change the name of the insured.

XVII.

Upon the expiration of the Marquette policy No. CA-1011, an audit was made to determine if any additional premium was due as a result of the operation of the assured's business during the life of the policy. Whereupon, it was determined that no additional premium was due upon the policy CA-1011.

XVIII.

Phoenix Indemnity Company defended the original action and was cast in judgment. Phoenix undertook the defense of the original action because subsequent to the incorporation of Joseph Jurisich, Jr., d b/a Joseph Jurisich Marine Service, and prior to the accident which gave rise to the original action, Phoenix Indemnity Company's policy expired and they issued a new policy which included

Joseph Jurisich Marine Service, Inc., as a named assured. Phoenix Indemnity Company's policy in effect at the time of the incorporation of Joseph Jurisich, Jr., d/b/a Joseph Jurisich Marine Service was never endorsed to include Joseph Jurisich Marine Service, Inc. and Phoenix Indemnity Company never received notice from Martin-Lebreton Insurance Agency of Mr. Joseph Jurisich's request for such an endorsement.

CONCLUSIONS OF LAW

I.

This Court had jurisdiction of the original action by virtue of the diversity of the parties' citizenship, and the amount in question, and consequently the Court has jurisdiction of these third party claims growing out of the oriignal action.

II

Phoenix Indemnity Company has been subrogated to the rights of Joseph Jurisich, Jr., d/b/a Joseph Jurisich Marine Service to seek reformation by reason of the fact that Phoenix has contributed toward the payment of the judgment rendered against the said Joseph Jurisich, Jr., d/b/a Joseph Jurisich Marine Service, and reserved all rights of reformation.

III.

A Court has the power to reform a contract of insurance, but the exercise of judicial authority does not extend to changing or modifying a written contract.

Isadore v. Washington Fire & Marine Ins. Co., 75 So. 2d, 247

IV.

A contract of insurance is subject to reformation in a proper case, even after loss or expiration of the policy.

Maryland Casualty Co. v. Kramel, 80 So. 2d 897

V.

Martin-Lebreton Insurance Agency acted as agent of all of the parties in the third party actions, and therefore the failure of Martin-Lebreton to make the requested endorsements or to timely notify the insurance companies can not be ascribed to any one party, but must be imputed to all of the parties.

VI.

There must be mutual agreement, supported by consideration, in order to modify a contract of insurance.

Fidelity & Casualty Co. of N. J. v. Gallicott, 88 So. 2d 724;

Isadore v. Washington Fire & Marine Ins. Co., supra

VII.

A change or modification of a policy of insurance in the form of the addition of an assured must be in writing in order to be valid.

Louisiana Insurance Code, R.S. 22:624, 628;

Adallan's Inc. v. Fidelity Phoenix Fire Ins. Co., 81 F.2d, 226;

Laurent v. Unity Industrial Life Ins. Co., 189 La., 426; 179 So. 586;

Muse v. Metropolitan Life Ins. Co.; 191 So. 586, aff'd. 193 La. 605, 192 So. 72;

Kennedy v. Audubon Ins. Co., 82 So. 2d 91;

Carruth v. State Farm Mutual Automobile Ins. Co., 113 So. 2d 56

VIII.

The addition of Joseph Jurisich Marine Service, Inc. is not valid as a "binder", because more than ninety (90) days elapsed after the incorporation before the accident occurred. Binders may only take effect within ninety days.

Louisiana Insurance Code, R.S. 22:631.

IX.

The evidence offered does not entitle Phoenix to a reformation of the policy issued by Marquette. In order to establish a cause of action for reformation of a contract, the evidence must be clear, convincing and satisfactory that the instrument does not conform to the intentions of the parties. The third party complaint for reformation is denied.

Southwest Producing Co. v. Hattie Bros., 230 La. 339; 88 So. 2d 654;

Merritt v. Hays, 237 La. 557, 111 So. 2d 771;

Standard Oil Co. of La. v. Futral, 204 La. 215, 15 So. 2d 65;

McGee v. Booty, 47 So. 2d 379

X.

Phoenix Indemnity Company was placed in the same position as Marquette Casualty Company by the failure of Martin-Lebreton Insurance Agency to endorse the policies as requested by Mr. Joseph Jurisich, Jr., and the fact that Phoenix Indemnity Company issued a renewal policy prior to the accident and therefore defended the original action does not justify the conclusion that they insured Joseph Jurisich Marine Service, Inc. from its incorporation.

XI.

Phoenix Indemnity Company had no duty to undertake the defense of the original action on behalf of Marquette Casualty Company. If there had not been a renewal policy issued by Phoenix Indemnity Company prior to the accident, both companies would have been in the very same position.

XII.

The cross-claim of Marquette Casualty Company against Phoenix Indemnity Company is dismissed.

Judgment has been entered accordingly.

New Orleans, Louisiana, May 15, 1962.

United States District Judge
s/ Herbert W. Christenberry

CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 11 pages to contain a true and correct copy of the supplemental record in the case entitled "Marcus L. Givens -vs- Folse Drayage Company, Inc., Highway Insurance Underwriters, Joseph Jurisich Marine Service, Inc. and Phoenix Indemnity Company" No. 5417 of the Civil Action Docket of this Court.

SEAL OF COURT

WITNESS my hand and the sale of said Court at the City of New Orleans, Louisiana, this day of May, A.D., 1962.

A. DALLAM O'BRIEN, JR., CLERK

BY

Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

No. 19,493

PHOENIX INDEMNITY COMPANY and JOSEPH JURISICH MARINE SERVICE, INC.,
Appellants,

versus

MARQUETTE CASUALTY COMPANY,
Appellee.

Appeal from the United States District Court for the for the Eastern District of Louisiana.

(July 24, 1963.)

Before RIVES, CAMERON and BELL, Circuit Judges.

CAMERON, Circuit Judge: At 7:45 P.M., April 21, 1955, Marcus L. Givens received severe personal injuries when the automobile he was driving was side-swiped by a dragline owned by and being moved under the supervision of Joseph Jurisich Marine Service, Inc., hereinafter sometimes called Marine Service, Inc. The dragline which struck him was loaded on a truck owned and being operated by Folse Drayage Company, and the dragline's tracks

(which occasioned the damage) protruded two feet seven inches beyond each side of the truck's platform or bed.

Givens sued to recover for his injuries, naming Folse Drayage Company, Inc., its insurer, and Marine Service, Inc. and Phoenix Indemnity Company,[1] its insurer, as defendants. After Marine Service, Inc. and Phoenix had, pursuant to permission granted by the court below, filed a third party complaint against appellee Marquette Casualty Company alleging that Marquette was an insurer of Marine Service, Inc., Givens filed a supplemental complaint bringing in as additional parties defendant Joseph Jurisich, Marquette Casualty Company and Maryland Casualty Company, claiming damages for his injuries against them in addition to the original defendants.

At the beginning of the trial of Givens' action for damages, the court below severed the third party action between Marine Service, Inc., Phoenix and Marquette so as to eliminate this acrimonious controversy from the trial of Givens' damage suit. The final judgment entered in Givens' case, reciting that it was entered upon the motion of Marine Service, Inc., Phoenix and Marquette, reserved this controversy for future action in these words:

> "It is further adjudged that the third party complaint of Joseph Jurisich Marine Service, Inc. against Marquette Casualty Company and the cross claim of Marquette Casualty Company against Phoenix Indemnity Company be reserved for a separate trial as to such matters and that the fact that Marquette Casualty Company is not

[1]Being the same company as Phoenix Assurance Company of New York, the appellant here, the name having been changed in the interim.

made a judgment debtor will not prejudice in any way the rights of third party complainant Phoenix Indemnity Company against the said Marquette Casualty Company."

The court, in the *Givens* case, also eliminated by summary judgment, Joseph Jurisich as an individual and as one of the partners of Joseph Jurisich Construction Company, in addition to Maryland Casualty Company.[2]

The portion of this civil action involving the liability of Marine Service, Inc. and its insurers to Givens proceeded to trial and resulted in a verdict for $80,000.00 in his favor and against Folse and its insurer and against Marine Service, Inc. and Phoenix, its insurer; and this Court affirmed that judgment, *Phoenix Indemnity Company et al v. Marcus L. Givens*, 1959, 263 F.2d 858. Many of the complicated facts involved in the severed portion of the civil action now before us will be found in our opinion in the above case.

The attorneys for Phoenix and for Marquett appeared and participated in that trial, supporting the defenses offered on behalf of Joseph Jurisich Marine Service, Inc.; and each of said companies filed a separate motion for judgment notwithstanding the verdict or for new trial and participated in the hearings thereof, the motions being denied May 15, 1958 by the trial court.

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[2]In its findings of fact here, the court below stated that this summary judgment had been granted because of its finding that the dragline which caused the injury had been transferred by the partnership Joseph Jurisich Construction Company to Joseph Jurisich, and by him to Joseph Jurisich Marine Service, Inc., appellant here, at the time this corporation was formed on October 15, 1954, some six months prior to the time the personal injuries were received by Givens.

The judgment in Givens' favor was paid in full by Folse and its insurer who paid $24,868.67, and by Phoenix, as insurer of Marine Service, Inc., which paid the sum of $55,131.33.

This action by Joseph Jurisich Marine Service, Inc. and Phoenix seeks to recover all or a portion of the monies so paid out by Phoenix, and any other amount which may be proved to be due it, by reforming Marquette's policy No. CA 1011, which was in effect from 12:01 A.M. April 22, 1954 to 12:01 A.M. April 22, 1955.[3]

The controlling facts upon which the court below, sitting without a jury, rendered judgment in favor of Marquette will be stated with as much brevity as their intricacy will permit. In the months preceding October, 1954, Joseph Jurisich was engaged in a number of businesses and he carried liability insurance covering each of the several operations with one or more of a number of different insurance companies. Most of this coverage he obtained from Martin-Lebreton Agency (hereinafter sometimes known as Martin), which agency was the general sales agent of several companies, including Phoenix Indemnity Company, the appellant, and Marquette Casualty Company, the appellee, and Maryland Casualty Company. It was authorized to sign and deliver policies, as well as endorsements or riders changing or supplementing their terms.

Under the arrangement existing for some years between him and the insurance agency, Jurisich left to the

[3]The named insureds in Marquette's policy were "Joseph Jurisich, Jr. d/b/a Joseph Jurisic' Transfer and as *Joseph Jurisich Marine Service*, and Joseph Jurisich, Jr. and Joseph Larson, a partnership d/b/a Joseph Jurisich Motor Freight." [Emphasis added.]

agency complete authority to place his policies with any insurance company it should select. Marine Service, Inc. was, at the time of the Givens injury, insured under a policy of general liability insurance by Phoenix Indemnity Company, which was issued in January of 1955. That policy was a renewal of a policy theretofore in force covering several of the businesses Joseph Jurisich was conducting as an individual. The general liability policy was issued by Martin to Marine Service, Inc. as insured solely upon verbal instructions given to Martin by Jurisich at or about October 15, 1954, the time when the several properties of Jurisich were transferred to the newly-formed corporation, Marine Service, Inc.

Marquette had carried comprehensive automobile liability policy No. CA 1011, which was, under its terms, in force from 12:01 A.M. April 22, 1954 to the same hour April 22, 1955. In said policy, the name of the insured was carried as shown in Footnote 3 *supra*. The policy and a large number of endorsements had been signed by Martin and in them were listed more than forty motor vehicles as embraced within the coverage.

Maryland Casualty had kept in force a policy written by Martin covering Joseph Jurisich in his partnership with another under the name of Joseph Jurisich Construction Company. Prior to October 15, 1954, the dragline which occasioned the injury was the property of this partnership.

As of October 15, 1954 a corporation was formed in which all of the stock except qualifying shares was issued to and was thereafter owned by Joseph Jurisich individually. All of the properties and the business operations

theretofore conducted by Jurisich under the several names appearing above were then conveyed to the new corporation Joseph Jurisich Marine Service, Inc., which continued their operation.

Jurisich promptly telephoned George Martin, senior member of the partnership Martin-Lebreton Agency and in active charge of its business, that he had incorporated his various operations into the new corporation and he requested that all of the insurance be changed to the corporation. Martin replied that this would be done; and he testified that he gave notice of the change to each of the insurance companies involved, and that he instructed one of his clerks to make the necessary changes in the outstanding policies by issuing endorsements to cover each of them. Solely because of the failure of Martin's clerk to issue the necessary endorsements or new policies, no actual changes were made in any of the policies outstanding to Jurisich and his various business operations until their respective expiration dates.

As stated, the policy of Phoenix which was in effect October 15, 1954 covered several of the businesses of Joseph Jurisich in the same manner as the policy of Marquette. The Phoenix policy expired January 19, 1955. Without further word from Jurisich than that given verbally on or about October 15, 1954, the Phoenix policy was, upon its expiration, renewed by Martin, so as to show Joseph Jurisich Marine Service, Inc. as the sole insured. At the time of the collision resulting in the judgment in favor of Givens, therefore, the policy of Phoenix named the new corporation as the insured. Phoenix admitted its liability

under the policy and it defended the suit and paid $55,131.33 of the judgment.

As shown above, the Marquette policy in force when the new corporation was organized did not expire until 12:01 A.M. March 22, 1955, less than twenty-four hours after the Givens accident had occurred. Shortly after the collision occurred, Martin issued Marquette's renewal policy effective at 12:01 A.M. March 22, 1955, which named the new corporation as the sole insured. This renewal was issued entirely as the result of the verbal instructions which had been given Martin by Jurisich on or about October 14, 1954.

The foregoing facts appear from the record without substantial dispute, and the findings of fact entered by the court below are in practical accord. The crucial facts may be summarized:-

The dragline involved in this collision was owned by Marine Service, Inc. at the time of the collision and had been so owned for several months. It had been loaded on Folse's truck under the supervision of an agent of Marine Service, Inc. and was being transported under the sole supervision of an agent of the corporation. Joseph Jurisich, as an individual, as a partner, or as a person doing business under the trade names in the policies of insurance in effect prior to October 14, 1954, had, at the time of the accident, no title to the dragline or of any of the properties formerly owned by the said businesses, except such as arose from ownership of substantially all of the stock of Marine Service, Inc. The transfer of this property and ownership of the businesses had been made known to the

managing partner of the insurance agency on or about October 15, 1954, and that partner agreed to change the names of the insureds to Marine Service, Inc., and he issued instructions to his employees that the requisite changes be made in the policies than existing, including Policy No. CA 1011 of Marquette.

There is no doubt, therefore, that it was the intent of the parties long before liability to Givens arose that Marquette be liable under the terms of Policy No. CA 1011 for personal injuries arising from the ownership of the dragline which occasioned the personal injuries to Givens. That intention was not expressed in writing by endorsement on the existing policy or issuance of a new policy solely because of the negligent failure of the insurance agency to act upon instructions received by it from the authorized agent of Marine Services, Inc. And we can perceive no legal impediment in the way of the entry of a judgment by the trial court to effectuate that intention.

The court below thought that the appellant could not prevail because "The dragline can only be covered by the policy (CA-1011) if there was an endorsement issued which would have included the equipment owned and operated by Joseph Jurisich Marine Service, Inc. within the coverage afforded by the said policy." We do not think that the mere failure of Marquette's agent to issue the endorsement pursuant to its agreement bars the right of appellants to recover whatever amount Marquette would have been obligated to pay if the endorsement had been properly issued. The trial court should, in our opinion, have reformed the Marquette policy so as to show Joseph

Jurisich Marine Service, Inc. as the insured on and after October 14, 1954, and should have entered judgment against the insurer for the amount due under the terms of said policy and under the situation existing between the two insurance companies.

This result follows, we think, from the decisions of the courts of Louisiana and those of this Circuit and the law generally. And it follows whether the reformation is based upon waiver or estoppel or upon the undisputed proof that the failure to name the assured accurately resulted solely from the negligence of Marquette's authorized agent.

Cases bearing on the subject are legion, but it is necessary to cite only a few of them. First, to consider some of the cases the court below relied upon. The case of *Isadore v. Washington, Etc. Insurance Co.*, C.A. La. 1954, 75 So.2d 247, is cited in support of the court's conclusion that a court's power to reform a contract "does not extend to changing or modifying a written contract." A reading of the case demonstrates that it does not sustain that view. The company had claimed that it mailed an endorsement withdrawing coverage on an insured building. The holding of the appellate court merely agreed with that of the lower court, that the insured had not recived the endorsement and it had affirmed the lower court's holding that the company could not withdraw coverage without the consent of the insured.

The trial court's basic conclusion of law against appellants here is that "A change or modification of a policy

of insurance in the form of the addition of an assured must be in writing in order to be valid."[4] The statute does not apply to the addition of an insured any more than to any other changes or modification. A reading of the cases simply reflects that they do not support the trial court's conclusion based, presumably, on a literal application of the statute's provisions.

Adallan's was a case by this Court dealing with Florida law. *Laurent* holds that the agent of the company there covered could not waive any provisions of the policy. *Muse* deals with whether a loss of a hand by severance comes within the policy terms. *Kennedy* involves only a construction of the meaning of the policy as applied to the facts of that case. *Carruth* declares the company not liable where the insurance was procured by fraud.

The court below cites four cases[5] for the holding that, in order to establish a cause of action for reformation of a contract, the evidence must be clear, convincing and satisfactory that the instrument does not conform to the intentions of the parties. Nobody denies this general principle. We have read the cases and find nothing in them

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[4]The court cites Louisiana Insurance Code R.S. 22: . . . .638 as the chief basis of this holding:

"§ 628. Must contain entire contract. No agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless in writing and made a part of the policy."

[5]The cases cited by the court are: Adallan's, Inc. v. Fidelity-Phoenix Fire Insurance Co., 81 F.2d 226; Laurent v. Unity, Etc. Co., 189 La. 426; 179 So. 586; Muse v. Metropolitan Life Insurance Co., 191 So. 586, Affirmed, 193 La. 605, 192 So. 72; Kennedy v. Audubon Insurance Co., 82 So.2d 91; Carruth v. State Farm Mutual Automobile Ins. Co., 113 So.2d 56.

[6]Southwest Producing Co. v. Hattie Bros., 230 La. 339, 88 So.2d 654; Merritt v. Hayes, 237 La. 557, 111 So.2d 771; Standard Oil Co. v. Louisiana v. Futral, 204 La. 215, 15 So.2d 65; McGee v. Booty, 47 So.2d 379.

that tends to establish that this principle is decisive on the facts before us.

On the crucial point here, the evidence is all one way and bears repeating here: Whether the parties agreed prior to the Givens' accident that, after October 14, 1954, the insured under the Marquette policy was the new corporation, Joseph Jurisich Marine Service, Inc. Jurisich testified categorically that he informed the managing agent of Martin-Lebreton Agency that all of the properties of all of his businesses had been conveyed to the new corporation, and requested that the insurance policy in question be changed to conform with this changed situation. Martin, partner in the insurance agency and the ranking officer in its operation, testified that Jurisich did telephone and give him this information about the time the new corporation was formed, that he agreed to make the requested changes, that he passed the information along to his clerical force with the direction that proper endorsements be written out and delivered to the insured to memorialize the changes; and that it was his recollection that he notified each of the companies involved. Whether he did notify Marquette and the other companies is of no moment. The Martin Agency was the general agent for the sale, issuance, modification and servicing of all policies for Marquette which met with the agency's approval; the agency had all the necessary blank forms and full power to agree to the requested change and to execute all papers to effectuate it.

Moreover, the proof showed without contradition that all of the operations described in the Marquette Policy No.

CA 1011 were transferred to the new corporation October 15, 1954; that they were managed by the same human beings and that the activities and operations were performed by the same persons and with the same equipment. The risk was not changed in any manner. The true ownership of the properties was, in substance, the same, and there was nothing in the proof which argued in any degree against the perfect fairness of the requested change in name. Moreover, all such questions are foreclosed by the undisputed proof that the requested change was agreed to by Marquette's agent having authority to make the agreement. It is not necessary to resort to the consideration of such proof as that to the effect that both the Phoenix policy and the Marquette policy were changed to the new corporation without any further word than that which was given on or about October 15, 1954 (thus arguing that the employees of the Insurance Agency must have made a written memorandum of the requested modification at the time it was made); that all premium payments thereafter were made by the new corporation to Martin; that Martin determined exclusively how Marine Service's payments were to be applied.

The law which furnishes the conclusion to be reached upon these undisputed facts is substantially all one way.

The recently revised text of American Jurisprudence states the general rule in these words:

> "In an action on a contract of insurance, the insurance company is generally considered estopped to deny liability on any matter arising

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[7]29A. Am. Jur., Insurance; § 1049, page 219.

> out of the . . . negligence of an agent of the company. If either party must suffer from an insurance agent's mistake it must be the insurance company, his principal. . . ."
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> ". . . Similarly, it has been held that the insurer was estopped to set up a breach of the provisions of a policy providing that it should be void if the interest of the insured was other than unconditional and sole ownership, and that no officer, agent, or other representative should have power to waive any provision, where it appeared that in applying for the policy the insured truly stated that his sole interest in the property insured was that of a holder of a sheriff's certificate under a mortgage foreclosure sale, but notwithstanding such information the agent carelessly and negligently omitted to state in the policy the nature of the insured's interest." Ib. § 1066, page 234.

This same rule is recognized in Louisiana:

> "It is an established rule of law in our jurisprudence that 'either party is always permitted, in a suit between the parties to a contract, to correct any error in the instrument purporting to evidence the contract, so as to make it express truly and correctly the intention of the parties.'" *Southwest Gas Producing Co. et al v. Hattie Bros.*, S. Ct. La. 1956, 88 So. 2d 649, referring to *Reynaud v. Bullock*, 196 So. 34, and *State v. Standard Oil Company of Louisiana*, 113 So. 867.

In *Brodie v. Atlas Assurance Co.*, 1925, 104 So. 620, 621-622, the Louisiana Supreme Court held to the same principle:

"There was a complete meeting of the minds on the subject of the insurance and the ownership, and the policies were issued on said agreement.

"The mistake and error committed was on the part of the agent in making out the policy in favor of the person in whose name the business had been formerly conducted, instead of making it in the name of the three owners who alone made the application for the additional insurance. And the same mistake was made in not changing the first policy so as to make it conform to the agreement . . .

"And a court of equity on a proper case shown will reform a written contract of insurance on the ground of accident, fraud, or mistake. Such mistake, among others, may be one in reference to the amount of insurance, the term and duration of the risk, the property or interest covered by the policy, or the name of the person insured and the ownership of the property . . . Corpus Juris, Volume 26, page 104."[5]

This Court recently (*Providence Washington Insurance Co. v. Rabinowitz*, 1955, 227 F.2d 300, 302-303) held that an insurance company is estopped to take advantage of the unilateral mistake of the company's agent, citing *Day v. Fireman's Fund Insurance Co.*, 67 F.2d 257, and *Springfield Fire and Marine Insurance Co. v. Martin*, 77 F.2d 492, from this Court. It also quoted § 504 of the

[5]And see also Pope Gammill Lumber Co. et al v. Zurich General Accident, Etc. Co., S. Ct. La. 1929, 122 So. 278; Monroe Air Park v. American Aviation and General Insurance Co., C. Ap. La., 1949, 41 So.2d 795; Maryland Casualty Co. v. Kramel, C. Ap. La. 1955, 80 So.2d 897; Maggio v. State Farm Mutual Automobile Insurance Co., C. Ap. La. 1960, 123 So.2d 901.

Restatement of the Law of Contracts and 14 R.C.L. § 83 as authority for holding that an agent of an insurance company may correct the policy to conform with the agreement even subsequent to the loss; and see also *Home Insurance v. v. Hightower et al*, 5 Cir., 1927, 22 F.2d 882; and *State Farm Insurance Co. v. Thompson*, and companion cases, 1957, 224 F.2d 291, affirming decision of the United States District Court for the Western District of Louisiana, 145 F.2d 473.

The court below held that appellant Phoenix was subrogated to the rights of appellant Joseph Jurisich Marine Service, Inc. and that there was no disability in its right to maintain this action. We agree with these holdings.

There remains only the question of the amount of the recovery, if any, appellant Phoenix Indemnity Company is entitled to have against Marquette Casualty Company. Phoenix contends that Marquette is primary insurer and is liable to it in the full amount of its coverage ($50,000.00), indicating in its brief, however, that it would be content to recover half of its outlay; and Marquette asserts that it is nothing more than excess insurer. The question of the amount of the recovery was not considered by the court below and this question ought to be submitted first to that court. The judgment appealed from is, therefore, reversed and the case is remanded for further proceedings consistent with this opinion. Costs of this appeal are assessed against the appellee.

REVERSED AND REMANDED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Marquette Casualty Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 24, 1963.

Issued as Mandate: November 14, 1963

Recoverable Costs:
Docketing cause, etc. $25.00

(October 16, 1963)

ORDER ON APPELLEE'S PETITION FOR REHEARING AND APPELLANT'S PRAYER FOR A MONEY JUDGMENT AGAINST APPELLEE

Before RIVES, CAMERON and BELL, Circuit Judges.

PER CURIAM

It is ordered that the petition for rehearing filed by appellee Marquette Casualty Company be and it is denied; it is further ordered that the prayer of Phoenix Indemnity Company and Joseph Jurisich Marine Service, Inc. for money judgment in their favor and against Marquette Casualty Company be and it is denied.